

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS J. Riley, : CIVIL ACTION
Plaintiff :
 :
v. :
 :
 :
ROBERT W. MYERS, et. al., :
Defendant : NO. 01-6958

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

December 18, 2002

Petitioner Thomas J. Riley ("Riley") is presently incarcerated at State Correctional Institution ("SCI") Rockview, Pennsylvania. Riley filed a pro se Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254; it alleged violations of his constitutional rights during and after his parole revocation hearing. This petition was referred to United States Magistrate Judge Carol Sandra Moore Wells who issued a Report and Recommendation ("R & R") that the petition be dismissed with prejudice. Riley has filed twenty-one objections to the R & R. After de novo consideration of the objections to the R & R, the R & R will be approved and adopted. Riley's Petition for Writ of Habeas Corpus will be denied and dismissed with prejudice, because Riley has failed to show denial of any constitutional right.

I. BACKGROUND AND PROCEDURAL HISTORY¹

On March 31, 1987, following a non-jury trial in the Court of Common Pleas, Philadelphia County, Riley was found guilty of robbery, criminal conspiracy and possession of an instrument of crime. See Commonwealth v. Riley, Nos. 1986-347, -348 and -352, Opinion at 1 (Ct. Com. Pl. Phila. Jan. 12, 1988). Riley was sentenced to a six to twelve year term of imprisonment. Id. The minimum expiration date of his sentence was September 19, 1994 and the maximum date was September 19, 2000. On direct appeal, Riley unsuccessfully claimed his conviction was invalidated by violation of Rule 1100,² because he was not tried within 180 days.³

¹Adapted from Judge Well's R & R with supplemental information from Riley's Objections to the R & R.

²Pa. Rule of Criminal Procedure 1100 provides a 180-day deadline for commencing trial. See Wells v. Petsock, 941 F.2d 253, 255 (3d Cir. 1991); Burkett v. Cunningham, 826 F.2d 1208, 1211 (3d Cir. 1987). The same 180-day limit is currently codified as Rule 600(A)(2): "Trial in a court case in which a written complaint is filed against the defendant, when the defendant is incarcerated on that case, shall commence no later than 180 days from the date on which the complaint is filed." Pa.R.Crim.P. Rule 600 (2002).

³Riley was arrested on June 19, 1986. See Commonwealth v. Riley, Nos. 1986-347, -348 and -352, Opinion at 2 (Ct. Com. Pl. Phila. Jan. 12, 1988). Trial was set for January 5, 1987; however, on October 9, 1986, the Commonwealth requested a continuance under Rule 1100(c) or (d). See Pet. for Extension Under Rule 1100(c) and/or (d), at 2 (Ct. Com. Pl. Phila. Oct. 9, 1986). Riley immediately filed a Motion to Dismiss under Rule 1100(f). See Mot. To Dismiss Under Rule 1100(f), at 2 (Ct. Com. Pl. Phila. Oct. 14, 1986). Judge Watkins denied Riley's Motion. On January 5, 1987, defense counsel requested a continuance for illness and, on January 21, 1987, no judge was available to try the case. See Commonwealth v. Riley, Nos. 1986-347, -348 and -352, Opinion at 2 (Ct. Com. Pl. Phila. Jan. 12, 1988). Finally, at the request of defense counsel, the trial was continued until April 1, 1987. Id. Trial actually began on March 31, 1987, a day earlier than scheduled.

Riley, filing post-judgment challenges in the trial court, contended that the court erred in denying Riley's Motion to Dismiss under Rule 1100(f). Id.; Commonwealth v. Riley, Nos. 1986-347, -348, and -352, Statement of Matters Complained of on Appeal at 1-2 (Ct. Com. Pl. Phila. July 27, 1987).

On March 20, 1995, Riley was paroled, but on May 31, 1995, the Pennsylvania Board of Probation and Parole ("Board") found him delinquent. See Respondents Superintendent Myers [sic] and the Pennsylvania Office of Attorney General's Answer to the Petition for Writ of Habeas Corpus ("Resp.") at 1; Ex. 13, Report of Board of Probation and Parole ("Report").

Riley was arrested in Philadelphia on September 22, 1996. See Riley v. Pennsylvania Board of Prob. and Parole, No. 2132 C.D. 2000, Mem. Op. at 2 (Pa. Commw. Ct. May 31, 2001⁴). On September 27, 1996, the Board lodged a detainer warrant charging Riley with technical parole violations because of this arrest. Resp. at 1. Riley was granted a continuance with respect to disposition of his alleged technical parole violations pending the disposition of the criminal charges. Id. On May 21, 1997, Riley was convicted in state court of robbery, conspiracy, kidnaping and possession of an instrument of crime. Prior to sentencing on the new charges, Riley requested a panel hearing regarding revocation. On December 22, 1997, Riley was sentenced to a term of 25 to 50 years in state prison on the new charges.

The Court of Common Pleas, refusing to disturb its judgment, found that Riley's "rights under Rule 1100 were not violated." See Commonwealth v. Riley, Nos. 1986-347, -348 and -352, Opinion at 7 (Ct. Com. Pl. Phila. Jan. 12, 1988). Riley, appealing to Superior Court, raised only the Rule 1100 issue. See Commonwealth v. Riley, No. 1795 Phila. 1987, Memorandum at 1 (Pa. Super. June 23, 1988). The Supreme Court of Pennsylvania denied allocatur on November 1, 1988. See Pet. at 6.

⁴See Riley's Objection 2 in Petitioner's Objections to Report and Recommendation Filed August 28, 2002; the correct date of Commonwealth Court's opinion is May 31, 2001, not May 31, 2000 as erroneously stated in the R & R.

On March 21, 1998, Riley was convicted of additional federal charges of carjacking, conspiracy to commit carjacking, as well as aiding and abetting, and was sentenced to a federal prison term of 166 months. See Resp. at 2.

On April 17, 1998, Riley was returned to SCI Rockview. Id. Riley was represented by Public Defender David Crowley who, prior to a panel hearing, raised the issue of timeliness because more than 120 days had expired since Riley returned to SCI Rockview. See Resp., Ex. 9, Hearing Report at 2a (PBPP Dec. 18, 1998). Crowley's motion was denied. On September 22, 1998, Riley signed a waiver of a panel hearing.

On October 27, 1998, a violation/revocation hearing was held. On March 29, 1999, the Board recommitted Riley "when available": (1) to serve a term of 24 months backtime as a technical parole violator; and (2) to serve his unexpired term of 5 years, 1 month and 17 days from the 6-12 year sentence as a convicted parole violator. See Riley v. Pennsylvania Board of Prob. and Parole, No. 1448 C.D. 1999, Memo. Op. at 6 (Pa. Commw. Ct. April 20, 2000). These terms were to be served concurrently.

Riley, filing an administrative appeal with the Board on April 8, 1999, contended that the "when available" designation was illegal; the administrative appeal was denied. Riley then appealed to the Commonwealth Court, and, on April 20, 2000, the Commonwealth Court vacated the Board's order and remanded for a

determination of Riley's custody status and commitment credit with respect to the federal sentence that had been imposed. Id. On July 3, 2000, after consulting with the Federal Bureau of Prisons, the Board made the status determination required by the court. See Resp., Ex. 14, Letter from Crowley to Riley, July 24, 2000. Public Defender Crowley notified Riley that there did not appear to be any grounds for an administrative appeal and told him that if Riley wanted to file himself, he must do so quickly. Id.

On July 31⁵, 2000, Riley filed a pro se petition for administrative review of the Board's July 3, 2000 decision. See Riley v. Pennsylvania Board of Prob. and Parole, No. 2132 C.D. 2000, Memo. Op. at 3 (Pa. Commw. Ct. May 31, 2001). On August 29, 2000, the Board denied the petition as untimely and unauthorized. See Resp., Ex. 15, Letter from Thomas to Riley, Aug. 29, 2000. Riley, appealing again to the Commonwealth Court, contended that Public Defender Crowley was ineffective for failing to preserve the issue of timeliness of the October, 1998, violation/revocation hearing in the April, 1999, administrative appeal. See Riley v. Pennsylvania Board of Prob. and Parole, No.

⁵The correct date that Riley filed his pro se petition for administrative review of the Board's July 3, 2000 decision was July 31, 2000 not August 4, 2000 as erroneously stated in the R & R. Objection 1, Petitioner's Objections to Report and Recommendation Filed August 28, 2002. July 31, 2000, the date Riley turned over his petition to the prison authorities, is the filing date under the mail box rule established in Commonwealth v. Jones, 700 A.2s 423, 426 (Pa. 1997); see also Coldren v. Pa. Board of Probation & Parole, 795 A.2d 457 (Pa. Cmwlth. 2001); see Pettiborne v. Pa Board of Probation & Parole, 782 A.2d 605, 607 (Pa. Cmwlth. 2001).

2132 C.D. 2000, Memo. Op. at 3 (Pa. Commw. Ct. May 31, 2001⁶). Riley was assisted in this appeal by Craig Miller, Esq. The Commonwealth Court, having determined that Riley had waived the ineffective assistance of counsel issue, affirmed the Board's August 29, 2000 order. See id. The Pennsylvania Supreme Court denied allocatur on October 22, 2001. See Riley v. Pennsylvania Bd. Of Prob. & Parole, No. 519 MAL 2001, 788 A.2d 381 (Pa. Oct. 22, 2001); Riley v. Pennsylvania Bd. Of Prob. & Parole, No. 154 MAP 2001, 791 A.2d 1152 (Pa. Jan. 15, 2002).⁷

Riley, filing this habeas corpus petition on December 20, 2001, raised three ineffective assistance of counsel claims. First, he claims attorney Crowley was ineffective in "failing to appeal [the] timeliness issue to Commonwealth Court that he raised at [the Board's October 27, 1998] initial hearing." Second, Riley claims attorney Crowley was ineffective in refusing to file a timely appeal from the Board's July 3, 2000 order, in disregard of Riley's written request, and failing to advise Riley

⁶See supra note 5.

⁷Riley noted in objection 3 of Petitioner's Objections to the Report and Recommendation filed August 28, 2002, that a series of filings and decisions had been omitted from the R & R. For example, Riley filed a "Petition for Collateral Relief Pursuant to Scott v. Board, 739 A.2d 1142 (Pa. Commw. Ct. 1999)," on June 22, 2001; the Board refused to take further action because the petition was unauthorized. Riley filed a "Petition for Review" on August 1, 2001, in the Commonwealth Court, but the Commonwealth Court denied the petition for review because there was no appealable order. On September 7, 2001, Riley also filed a "Petition for Review in the Nature of Mandamus" in the Commonwealth Court, but the matter was quashed because there was no final order from which an appeal could be taken. An application for reargument was filed and denied. A Notice of Appeal and Jurisdictional Statement was filed to the Pennsylvania Supreme Court, but the appeal was quashed on January 15, 2002.

timely that he would not file the appeal. Finally, Riley contends Attorney Miller was ineffective for failing to assert Crowley's "ineffectiveness in a proceeding before the board" prior to raising it in Commonwealth Court. Respondents contend all three claims were procedurally defaulted and should be dismissed.

The petition was referred to Magistrate Judge Carol Sandra Moore Wells for a Report and Recommendation ("R & R"). On August 27, 2002, Judge Wells recommended that Riley's Writ of Habeas Corpus be denied and dismissed with prejudice, because Riley had not met the procedural requirements to have his petition reviewed. Riley filed timely objections. Some of his objections had merit, but Riley's objections do not affect the underlying Recommendation to deny his petition for Writ of Habeas Corpus and dismiss with prejudice.

II. DISCUSSION

In ruling on a petition for a writ of habeas corpus under 28 U.S.C. § 2254, a federal court may only consider claims that the petitioner is being held in custody in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). The court cannot consider the merits of a habeas corpus claim unless and until petitioner has exhausted all available state

remedies. See 28 U.S.C. § 2254(b)(1)(A)⁸; Rose v. Lundy, 455 U.S. 509, 519 (1982); Picard v. Connor, 404 U.S. 270, 275 (1971); Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993), aff'd. 30 F.3d 1488 (3d Cir. 1994); Brown v. Cuyler, 669 F.2d 155, 157 (3d Cir. 1982).

The total exhaustion doctrine is rooted in our tradition of comity; the state must be given the "initial opportunity to pass upon and correct" alleged violations of petitioner's constitutional rights. Picard, 404 U.S. at 275 (citing Wilwording v. Swenson, 404 U.S. 249, 250 (1971)); see also Tillett v. Freeman, 868 F.2d 106 (3d Cir. 1989). The exhaustion rule requires Riley to have fairly presented any claims he is asking the federal court to review at all levels of the state judicial system. See Anderson v. Harless, 459 U.S. 4 (1982); Gibson v. Scheidmantal, 805 F.2d 135 (3d Cir. 1986); Evans v. Ct. Com. Pl., 959 F.2d 1227 (3d Cir. 1992)(claim must have been presented to intermediate appellate court, as well as state's highest court).

Where a habeas petition has been referred to a

⁸The exhaustion requirements of 28 U.S.C. § 2254 provide:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State Corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant...

magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636 (b).

A. Exhaustion of Challenges to Decisions of the Pennsylvania Board Of Probation and Parole

Riley objects to the finding in the R & R that "the only method by which a Pennsylvania inmate may challenge the decision of the Pennsylvania Board of Probation and Parole ("Board"), under state law, is a mandamus action in Commonwealth Court. See Rogers v. Pennsylvania Bd of Prob. & Parole, 724 A.2d 319, 323 n.5 (Pa. 1999)." Riley argues that there is a right to take an appeal to the Commonwealth Court from a final decision by the Board revoking parole and that the proceeding does not have to be an action of mandamus. See Bronson v. Pa. Board of Probation & Parole, 421 A.2d 1021 (Pa. 1980) (action for revocation of parole may be in the nature of mandamus or a constitutionally guaranteed appeal from the action of an administrative agency).

A Pennsylvania court reviewing an action of a Commonwealth agency is limited to determining whether a constitutional violation, an error of law or a violation of agency procedure has

occurred and whether the necessary findings of fact are supported by substantial evidence. See Rogers, 724 A.2d at 322. An individual is only entitled to such review from an adverse decision by a Commonwealth agency where the decision constitutes an adjudication. 2 Pa. C.S. § 702. An "adjudication" is defined by the Administrative Agency Law as:

Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceedings in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture of property, paroles, pardons, or releases from mental institutions.

2 Pa. C.S. § 101.

The definition of adjudication clearly excludes parole decisions from appellate review. See Rogers, 724 A.2d at 322. Riley may still have a constitutionally guaranteed right of appeal from the Parole Board's actions, because a person who has been released on parole has a liberty interest in his freedom. See Bronson, 421 A.2d at 1025-26.

Parole revocation and parole release are quite different. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 9 (1979). Parole revocation applies to a paroled prisoner who enjoys a certain limited liberty to pursue

employment and familial relationships outside the confines of prison, while parole release applies to a confined prisoner who has no present liberty interest. It was error for the R & R to rely on cases that involved parole denial rather than parole revocation, since different liberty interests were involved. However, this error is harmless and does not affect the merits of this case, because ground one was, in fact, presented to the Pennsylvania state courts.

B. Exhaustion of Present Claims

Riley presented his claim that Crowley was ineffective in failing to appeal to Commonwealth Court the timeliness issue raised at the October 27, 1998 hearing. Subsequently, he sought review of that decision in the state Supreme Court. Therefore, ground one was properly presented to the Pennsylvania state courts.⁹

⁹Petitioner's petition for allowance of appeal in the Supreme Court is unavailable for review; however, this Court will assume that Petitioner incorporated therein the same Crowley ineffective assistance of counsel claims presented to Superior Court. Furthermore, appeal to the Supreme Court of Pennsylvania may be no longer required for exhaustion. On May 9, 200, the Supreme Court of Pennsylvania adopted Rule #218 of Judicial Administration:

[A] litigant shall not be required to petition for rehearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error. When a claim has been presented to the Superior Court, or to the Supreme Court of Pennsylvania, and relief has been denied in a final order, the litigant shall be deemed to have exhausted all available state remedies for purposes of federal habeas corpus relief.

This decision has been followed by the District Court. See Mattis v. Vaughn,

Ground two, Crowley's alleged ineffectiveness in refusing to appeal the Board's July 3, 2000 order, was never raised in Commonwealth Court.¹⁰ Accordingly, this claim is unexhausted.

Riley's third contention that Miller was ineffective for failing to assert Crowley's ineffectiveness is also unexhausted. Riley did not include this issue in either of his mandamus actions in Commonwealth Court.¹¹

128 F. Supp.2d 249, 260-261 (E.D.Pa. 2001)(Antwerpen, J.)("principles of deference to Supreme Court dicta and of comity toward state courts, which is the basis of the exhaustion doctrine, require us to respect the pronouncement of the Pennsylvania Supreme Court in Order No. 218"); see also Lambert v. Blackwell, 175 F. Supp. 2d 776, 784 (E.D.Pa. 2001) (following Mattis); Ross v. Vaughn, 2001 U.S. Dist. LEXIS 14321, at *14 n.6 (E.D.Pa. June 13, 2001) (same).

¹⁰Riley objects to the finding that Crowley's alleged failure to appeal the Board's July 3, 2000 order, was never raised in the Commonwealth Court. Riley asserts that the Commonwealth Court ruled in its 5/31/01 Memorandum that "Riley alleged in his petition for review to this court that the untimeliness of the appeal was due to inaction on the part of previous counsel. However, Riley did not state or address that issue in his brief to this court." Riley states that if it was not raised in his brief, it was due to the ineffectiveness of Craig Miller who prepared the brief. Riley further states that review of Miller's brief would reveal that Miller did raise and brief the issue; however, Miller failed to raise a separate petition regarding Crowley's failure to appeal. Riley also argues that he raised Crowley's failure to appeal in his Petition for Review and Petition for Review in the Nature of Mandamus. Riley brought up this argument tangentially in these briefs; the court did not address them in its orders. Riley v. Pennsylvania Board of Prob. And Parole, No. 2107 C.D. 2001 (August 9, 2001); Riley v. Pennsylvania Board of Prob. And Parole, No. 2107 C.D. 2001 (September 17, 2001).

¹¹Riley objects to the finding that he did not raise the issue of Miller's ineffectiveness in the Commonwealth Court. Riley asserts that he raised it as an issue in his Petition for Review and Petition for Review in the Nature of Mandamus. Case No. 2107 C.D. 2001 and Case No. 2107 C.D. 2001. However, the issue of Miller's ineffectiveness was not the key issue in these motions, and the courts did not rule on that issue. Riley v. Pennsylvania Board of Prob. And Parole, No. 2107 C.D. 2001 (August 9, 2001); Riley v. Pennsylvania Board of Prob. And Parole, No. 2107 C.D. 2001 (September 17, 2001)

C. Adequate and Independent Grounds for State Court Denial of Relief on Ground One

Riley's first contention, though exhausted, is still unreviewable, on adequate and independent state law grounds. It is well settled that a habeas court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question first presented and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991).

"A state rule provides an independent and adequate basis for precluding federal review of a state prisoner's habeas claims only if: (1) the state procedural rule speaks in unmistakable terms, (2) all state appellate courts refused to review the petitioner's claims on the merits, and (3) the state courts' refusal in this instance is consistent with other decisions." Doctor v. Walters, 96 F.3d 675, 683-684 (3d Cir. 1996).

Ground one meets these criteria. Commonwealth Court refused to rule on the merits of Riley's first ineffective assistance of counsel claim because Riley neglected properly to raise that claim before the Board as required by state law.¹² See Riley v.

¹²Riley objects to this finding that he did not raise his claim properly to the Board; Riley asserts that he did raise the issue to the Board, but the Board seems not to have ruled on this issue and instead issued a letter

Pennsylvania Board of Prob. And Parole, No. 2132 C.D. 2000, Memo. Op. at 3 (Pa. Commw. Ct. May 31, 2001). Pennsylvania courts clearly require a prisoner seeking to challenge an action of the Board first to exhaust his administrative remedies by instituting a proceeding before the Board. See Scott v. Pennsylvania Bd. Of Prob. & Parole, 739 A.2d 1142, 1145 (Pa. Commw. Ct. 1999). Riley concedes that he did not raise the issue of Crowley's ineffectiveness in a proceeding before the Board in maintaining that Miller should have raised the Crowley issue in Commonwealth Court. Judge Wells recommends that Riley's failure properly to raise Crowley's ineffective assistance of counsel is an "independent and adequate" state procedural bar to federal habeas review.

The Commonwealth Court clearly articulated this procedural bar as its reason for denying Riley relief. See Riley v. Pennsylvania Board of Prob. and Parole, No. 2132 C.D. 2000, Memo. Op. At 3 (Pa. Commw. Ct. May 31, 2001). Second, all state appellate courts refused to review Riley's claims because of the procedural defaults. See id.; Riley v. Pennsylvania Board of Prob. and Parole, No. 519 MAL 2001, 788 A.2d 381 (Pa. Oct. 22, 2001); Riley v. Pennsylvania Board of Prob. and Parole, No. 154

stating that the case had already been decided and it refused to adjudicate. See Riley v. Pennsylvania Board of Prob. And Parole, No.1806 C.D. 2001 (August 9, 2001).

MAP 2001, 791 A.2d 1152 (Pa. Jan. 15, 2002) (quashing Riley's appeal without published opinion). Finally, state courts' refusal in this instance "is consistent with other decisions." Doctor, 96 F.3d at 683-684. There are independent and adequate state grounds for dismissing petitioner's Count I.

D. Procedural Default for Grounds Two and Three

Grounds two and three are unexhausted.¹³ When issues are unexhausted and further direct or collateral review in state court is foreclosed, those claims are deemed procedurally defaulted for purposes of federal review. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). Procedurally defaulted claims are dismissed unless petitioner demonstrates both "cause" for the default and "actual prejudice as a result of the alleged violation of federal law," or that the court's failure to consider the claims will result in a "fundamental miscarriage of justice," i.e., newly discovered evidence makes it "more likely than not" that a reasonable juror would find a petitioner not guilty. Coleman, 501 U.S. at 750; Schlup v. Delo, 513 U.S. 298 (1995).

"Cause" sufficient to excuse procedural default requires a showing that some objective factor, outside petitioner's control,

¹³Riley objects to the conclusion that grounds two and three are unexhausted. See supra notes 10 and 11.

prevented compliance with state procedural rules. See Murray v. Carrier, 477 U.S. 478, 488(1986). "Actual prejudice" occurs only if an error caused the "actual and substantial disadvantage" of petitioner. U.S. v. Frady, 456 U.S. 152, 170 (1972). The burden of proof is on petitioner to establish both cause for the default and resulting prejudice. See Teague v. Lane, 489 U.S. 288, 298 (1989).

Ground two, Crowley's alleged default following the July 3, 2000 order, was never raised in Commonwealth Court, see Riley v. Pennsylvania Board of Prob. And Parole, No. 3132 C.D. 2000, Memo. Op. At 3 (Pa. Commw. Ct. May 31, 2000), and is therefore procedurally defaulted for purposes of federal review. Since petitioner has demonstrated neither cause for the default, actual prejudice as a result of the alleged violation of federal law, nor that the court's failure to consider the claims will result in a fundamental miscarriage of justice, the claim will be dismissed.

Since Riley failed to present ground three to the Board during the 30 day review period under 37 Pa. Code § 73.1, the Commonwealth will not now entertain a late challenge to the

Board's action.¹⁴ See Evans v. Pennsylvania Dep't of Corrections, 713 A.2d 741, 743 (Pa. Commw. 1998). This claim is procedurally defaulted, since if Riley were now to petition the Board to consider the alleged prior default of attorney Miller, it would deny Riley's request as untimely. See 37 Pa. Code § 73.1(b)(3). An appeal to Commonwealth Court on a petition for mandamus would likewise be rejected on procedural grounds. Riley faces an impenetrable procedural bar to any future state court review of claims two and three. Additionally, Riley has expressed no grounds on which this Court could find either "cause" for his default, or resulting "prejudice." Even if this Court were to reach the merits of grounds two and three, Riley would still not be entitled to habeas relief.

E. No Denial of Constitutional Right

Riley's claims are not cognizable under federal law. In Person v. Pennsylvania Board of Prob. and Parole, 1999 U.S. Dist. LEXIS 16382 (E.D. Pa. Oct. 20, 1999), this court held that "there is no constitutional right to counsel in parole revocation proceedings." Id. at *35. Riley, objecting, asserts that a right to counsel was established in Mempa v. Rhay, 389 U.S. 128, 137

¹⁴The R & R recommended that both grounds two and three were unexhausted. Riley asserts that he mailed a petition to the Board on ground two on July 31, 2000; therefore, it was timely under the mailbox rule established in Commonwealth v. Jones, 700 A.2d 423, 426 (Pa. 1997). Riley admits that he did not present ground 3 to the Board in the 30 day time period.

(1967). In Mempa, the proceeding was both a probation and sentencing proceeding; there is a right to counsel at all stages of the sentencing process. The Court concluded that there was a right to counsel despite what the actual proceeding was called.

The petitioner in Person argued that his counsel was ineffective during parole revocation proceedings for not raising certain arguments before the Board and on appeal to Commonwealth Court. The court wrote:

To the extent that Person is also arguing that he is entitled to federal habeas relief because his Sixth Amendment right to counsel was violated by counsel's ineffectiveness, this argument must fail. There is not absolute constitutional right to counsel in parole revocation hearings. Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973)...Since there is no constitutional right to counsel in parole revocation proceedings, just as in state post-conviction proceedings, there can be no cognizable claim of constitutionally ineffective assistance of counsel in such proceedings. Therefore, Person is not entitled to habeas relief on this basis.

Id. at *35.

In addition, Riley has "no constitutional right to insist that appellate counsel advance every non-frivolous argument the defendant wants raised."¹⁵ Virgin Islands v.

¹⁵Riley objects to the conclusion there is no constitutional right to insist that appellate counsel advance every non-frivolous argument, to reach the conclusion that Crowley deliberately omitted the timeliness issue from his

Weatherwax, 77 F.3d 1425, 1433 (3d Cir. 1996). Crowley, who had vigorously argued the timeliness issue before the Board at the hearing, deliberately omitted a relatively weak argument from his Commonwealth Court brief; Crowley's conduct met an "objective standard of reasonableness." Strickland v. Washington, 466 U.S.C 668, 687-88 (1984).¹⁶

III. CONCLUSION

For the foregoing reasons, this court approves and adopts the R & R. Riley's Writ of Habeas Corpus will be denied and dismissed with prejudice, because Riley has failed to establish a denial of a federal constitutional right.

An appropriate Order follows.

Commonwealth brief. Riley argues that the timeliness issue was not a relatively weak argument since Riley claims it was his only defense on the issue of whether revocation was mandated.

¹⁶Riley, objecting to this assertion, claims that Crowley's actions were both objectively unreasonable and prejudicial to him.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS J. Riley, : CIVIL ACTION
Plaintiff :
v. : NO. 01-6958
ROBERT W. MYERS, et. al., :
Defendant :

ORDER

AND NOW, this 18th day of December, 2002, upon consideration of the Petition for Habeas Corpus, de novo review of the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells, the objections thereto, and for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation is **APPROVED AND ADOPTED;**
2. The Petition for Writ of Habeas Corpus is **DENIED AND DISMISSED**, with prejudice; and
3. A certificate of appealability is **DENIED**.

S.J.